IN THE HIGH COURT OF BOMBAY AT GOA.

CIVIL REVISION APPLICATION NO. 232 OF 2002.

Vasco Planning & Development
Authority through its Member
Secretary, Third Floor,
Commerce Centre, Vasco-da-Gama. ... Petitioner.

Versus

Shri Damodar Manjrekar,
Mangor Hill, Vasco-da-Gama. ... Respondent.

Mr. V.P. Thali and Miss G. Pednekar, Advocates for the Petitioner.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Respondent.

Coram : F.I. REBELLO, J.

Date : 7th August 2003.

ORAL JUDGMENT.

The petitioner herein had moved an application under Order VII, Rule 11 of the Code of Civil Procedure calling on the Court to dismiss the suit on the ground that the suit was barred by law. The trial Court, by the impugned Order of 23rd July 2002, held that on the facts of that case an inquiry by leading evidence would be necessary to ascertain whether the defendant acted in good faith or not and, therefore, the bar under Section 121 of the Town and Country Planning Act, 1974 would not come into play in the present case. It is that Order, which is the subject matter of the present application.

2. At the hearing of the petition, on behalf of the petitioner, learned counsel relies on Section 129 of the Act, which reads as under:-

> "Save as otherwise expressly provided in this Act, every order passed or direction issued by the Government or the Board or order passed or notice issued by any Planning and Development Authority under this Act shall be

final and shall not be questioned in any suit or other legal proceeding."

It is further submitted that a right is created under the Act. The Act provides remedies against orders as also enforcement of orders and in these circumstances reading both Section 129 and the other provisions of the Act it would mean that the jurisdiction of the Civil Court stands excluded. Reliance is placed on various Judgments, which will be adverted to in the course of discussion.

On the other hand, on behalf of the respondent, learned counsel contends that all that the trial Court has done is to record a finding that the issue which will arise cannot be decided without recording evidence. It is, therefore, submitted that the Order is an exercise of discretion and within the jurisdiction of the Court. Once the Court has exercised discretion, it will not be open for this Court to interfere in the exercise of revisional jurisdiction under Section 115 of the Code of Civil Procedure, considering the requirement therein. Apart from that, it is pointed out that at the highest even if Section 129 is considered, that would not bar the jurisdiction of the Civil Court when the Order is ultra vires and/or a nullity in law. In these circumstances, it is contended that it will be open to the Civil Court to exercise jurisdiction. Reliance has been placed on a large number of authorities.

3. At the outset it may be pointed out that it is a settled proposition of law that jurisdiction of the Civil Court is not ordinarily ousted. It can be ousted

only on two counts, one expressly and the other impliedly. There can be a situation where both the authorities under the Act as well as the Civil Procedure Code can exercise jurisdiction simultaneously. It is in this background and the context as settled by the Apex Court that the issue will have to be considered as to whether the Civil Court retains jurisdiction to entertain a suit in respect of a matter which was earlier the subject matter of a decision in proceedings under the Town and Country Planning Act. In the instant case it is contended that a show cause notice was issued to the predecessor of the respondent herein. An order was passed, which has become final. Once there is finality, it is contended that the Civil Court would have no jurisdiction. It is pointed out that the party against whom the Order was passed has expired. Merely because the party has expired by itself would not give a legal right to the legal representative to invoke the jurisdiction of the Civil Court. It is pointed out that after considering the averments as pleaded in the suit, it would not be a case where the Civil Court could entertain the civil suit. The classic exposition of law on the ouster of jurisdiction of the Civil Court would be the tests as laid down by the Apex Court in **Dhulabhai etc. v. State of Madhya Pradesh and another,** A.I.R. 1969 S.C. 78. There are seven propositions which may be gainfully reproduced:-

> "(1) Where the statute gives a finality to the orders of the special tribunal the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory

tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but it not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

The law thereafter has been explained in several other Judgments. Suffice it to say that gainful reference be made in the case of **Shiv Kumar Chadha v. Municipal Corporation of Delhi and others,** (1993) 3 S.C.C. 161. Those were proceedings which arose under the provisions of the Delhi Municipal Corporation Act, 1957. Section 343(4) of the relevant Act provided that no Court shall entertain any suit, application or proceeding for injunction or other relief against the Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of the said Section. Section 347-E bars the jurisdiction of the Courts by holding that no Court shall entertain any suit, application or other proceedings in respect of any order or notice appealable under Section 343 or Section 347-B and no such order or notice shall be called in question otherwise than by preferring an appeal under those Sections. A suit came to be filed. The issue that the Apex Court therefore had to decide was, whether a suit would be maintainable and/or whether the Court could hold that the suit was not maintainable. Considering the various tests and the earlier Judgments, which have been adverted to, including that of Dhulabhai etc. v. State of Madhya Pradesh(Supra) the Apex Court in such situation held that a Civil Court would be guided in entertaining such suits and laid down the following two propositions:-

(1) The Court should not ordinarily entertain a suit in connection with

> the proceedings initiated for demolition, by the Commissioner, in terms of Section 343(1) of the Corporation Act. The Court should direct the persons aggrieved to pursue the remedy before the Appellate Tribunal and then before the Administrator in accordance with the provisions of the said Act.
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> (2) The Court should entertain a suit questioning the validity of an order passed under Section 343 of the Act, only if the Court is of prima facie opinion that the order is nullity in the eyes of law because of any "jurisdictional error" in exercise of the power by the Commissioner or that the order is outside the Act."

To my mind these will be the two tests that the Court must apply while considering an application moved under Order VII, Rule 11 of the Civil Procedure Code. It may be mentioned that a large number of other Judgments were cited at the Bar for the same purpose. To my mind considering the Judgments in Dhulabhai v. State of Madhya Pradesh and another(Supra) and Shiv Kumar Chadha v. Municipal Corporation of Delhi and others, it is not necessary to advert to the other Judgments.

4. On the facts of the present case, the respondent/plaintiff in paragraph 27 of the plaint has taken several grounds under which the action of the petitioner/defendant is sought to be challenged. One of the grounds was that action of the petitioner/defendant is time barred under the Town and Country Planning Act. To this learned counsel points out that this Court has taken a view that there is no limitation insofar as the authorities are concerned for taking action against illegal constructions. The other ground is that the structure has been existing for more than 30 years since date and that no show cause notice has been issued and

yet action is contemplated and such other grounds. The trial Court while passing the Order has merely proceeded on the footing that for the purpose of considering the said pleadings it is necessary to hold an inquiry. Reference is made to some documents which were filed before the learned trial Court.

5. To my mind, it cannot be said that the suit does not prima facie disclose a cause of action, considering the pleadings, if the tests in Dhulabhai's case are applied. It is no doubt true that the trial Court did not address itself to the tests laid down in Dhulabhai's case. However, in my opinion, on the facts of the present case once the trial Court has exercised discretion, it will not be possible for this Court to interfere with the said exercise, considering that the Order does not suffer from any error of jurisdiction. At the highest it will be open for the petitioner herein to call upon the trial Court to frame an issue on the question of maintainability of the suit and get the suit disposed of considering the tests laid down in Dhulabhai's and Shiv Kumar Chadha(Supra) cases.

With the above, the revision application stands disposed of with no order as to costs.

(F.I. REBELLO)
JUDGE.